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IN THE

Supreme Court of the United States

October Term, 1949

No. 602

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

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vs.

PAN AMERICAN AIRWAYS, INC.,

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PETITIONERS' REPLY BRIEF

POINT I

The Bombolis case (241 U. S. 211) does not sustain Respondent's contention that the State Courts cannot determine whether Subdivision (1) of Article 22 of the Warsaw Convention infringes the Seventh Amendment of the Federal Constitution.

The *Bombolis* case, cited and quoted at p. 12 in Respondent's Brief, and the various other cases cited by Respondent, enunciate the general rule that the Seventh Amendment does not regulate or limit the action of the *State Legislature* or the *State* courts as regards *State* Legislative and *State* judicial practice and procedure in the enforcement of rights to jury trials. (For explanatory comment upon this rule, see *Vallavonti v. Armour & Co.*, 264 Mass. 337, 342, 162 N. E. 689, 690.) The case at bar, however, involving as it does a question

of unconstitutionality addressed exclusively to *Federal* legislative and executive action, is clearly distinguishable from those cases which are cited by defendant.

Plaintiffs' position is in accord with the principle enunciated in the *McElvaine* case (142 U. S. 155, 158), the *Newcomb* case (18 N. Y. S. 16, 17, 42 St. Rep. 442, 443), and various other similar cases cited at p. 12 of Respondent's Brief. (*Fox v. Ohio*, 5 How. (46 U. S.) 410, 434; *Jackson, etc. v. Wood*, 2 Cowen's Reps. (N. Y.) 819, 820-821, where the New York Supreme Court learnedly discusses the historical background of the first ten amendments, including the Seventh Amendment.) This principle is that the first ten amendments operate only on the various branches of our Federal Government—legislative, executive and judicial—and do not limit the powers of the States or any State agencies under State laws. State Courts have always been free to decide questions of unconstitutionality concerning *federal* laws under any of such amendments.

As it happens, percedents exist for the proposition that State courts have judicial power to determine and pass upon questions of unconstitutionality under the Seventh Amendment regarding *Federal* legislation involved in an action before such State court. (See authorities at p. 35 of Petitioners' Main Brief.

POINT II

None of the cases cited by Respondent supports its argument that the instant action is "not a suit at common law within the meaning of the Seventh Amendment".

The Simmons Case

(Cited at p. 15 of Respondent's Brief)

The *Simmons* case is *sui generis* and, therefore, clearly distinguishable from the case at bar on the facts and the law. There

plaintiff sued for the value of certain real estate taken by the United States Government. Plaintiff's claim stemmed from a Federal Statute expressly permitting plaintiff to sue the Government of the United States in the United States Court of Claims. One of the express conditions of such statute was that the proceedings be without a jury. Such a claim patently was without basis in, or similar to, actions in the category of "suits at law" or "suits peculiarly legal in nature" triable by jury according to the mode of proceedings of courts of law. It was rather in the class of suits known as "statutory condemnation proceedings", to which, traditionally, the Seventh Amendment has no application. (*U. S. v. Kennesaw, etc.*, 99 Fed. (2d) 830, 834 (C. C. A. 8th, 1938).)

The 243.22 Acres Case and the Welch Case

(Cited at p. 17 of Respondent's Brief)

These, like the *Simmons* case, involved condemnation proceedings and are not, therefore, applicable.

The Dimick Case

(Cited at p. 16 of Respondent's Brief)

The *Dimick* case is in no way contrary to the proposition contended for by petitioners. That case is even cited in the *Diederich* case (vide p. 34 of petitioners' main brief), which *applies the protection of the Seventh Amendment to statutory actions for wrongful death.* Recognizing that our "common law is not immutable, but flexible", the Court in the *Dimick* case emphasizes the principle that (p. 487) "To effectuate any change in these rules [when embodied in a constitutional provision] is not to deal with common law *qua* common law, *but to alter the Constitution*" (Emphasis and bracketed insertion supplied). In consonance with that very principle, petitioners maintain that Subdivision (1) of Article 22 of the Warsaw

Convention infringes not only their common law rights to trial by jury, but it is violative of their rights to trial by jury as *preserved in the Seventh Amendment of our Federal Constitution*, which may not thus be altered or invaded.

The other cases cited by Respondent are clearly distinguishable from the situation at bar by the salient factual and legal features presented at pp. 33-35 of petitioners' main brief.

POINT III

Workmen's Compensation Laws of various states and cases pertaining thereto are wholly inapplicable as juridical analogues in the determination of the instant question of unconstitutionality under the Seventh Amendment.

[N. B. Point IV at pp. 22-24 in Respondent's brief is predicated upon Workmen's Compensation Laws of various states and several cases thereunder. In essence, Respondent appeals to the analogies of "juryless" proceedings under such Workmen's Compensation Laws in defense of the arbitrary limitation of tortious liability of air carriers under the Warsaw Convention.]

To begin with, it must be recognized that the Workmen's Compensation Acts of various states are *State legislative acts*. As such they, as well as all court or administrative proceedings thereunder, are not controlled, limited, or in any way affected by the Seventh Amendment. (See the *McElvaine* case, the *Newcomb* case, and various other cases cited at p. 2, *supra*, of this reply brief.) But, by contrast, *all legislative and executive acts*, including treaties or conventions *of our Federal Government*, are subject to the limitations of the Seventh Amendment. (See discussion and authorities at pp. 30-32,

35-36 of petitioners' main brief and pp. 1-2, supra.) Palpably, subdivision (1) of Article 22 of the Warsaw Convention is the creature of the action of both *the legislative and executive branches of our Federal Government.*

Secondly, it should be noted that before the Workmen's Compensation Act (Chap. 67 of Consolidated Laws, Law of N. Y. of 1914, Ch. 41, 64 McKinney's Cons. L. of New York Annot. 2, § 1 *et seq.*) became law, for instance, in the State of New York, it became necessary to amend very specifically the Constitution of the State of New York.

[N. B. In *Ives v. So. Buffalo Ry.*, 201 N. Y. 271, 272-320 (1911), the Court of Appeals declared the original Workmen's Compensation Act (Art. 114 (a) of Labor Law, Ch. 674 of Laws of 1910) unconstitutional. But after the N. Y. Constitution was specifically amended by adding § 18 (formerly § 19) to Art. I thereof (2 McKinney's Cons. Laws of N. Y. Ann. 100) this Court upheld the constitutionality (under the Fourteenth Amendment of our Federal Constittuion) of a subsequent Compensation Act of the N. Y. Legislature as a proper exercise of state police power. (*N. Y. Cent. R. Co. v. White*, 243 U. S. 188, 195-196).]

Besides, Workmen's Compensation Laws were designed to govern and fix the rights of those strictly in the relationship of employee and employer in certain hazardous industries. (*N. Y. C. R. Co. v. White*, 243 U. S. 188, 202-204; *Jensen v. Southern Pac. Co.*, 215 N. Y. 515, 519, reversed in part and on other grounds in 244 U. S. 205; *Employers Mutual L. Ins. Co. v. Refined Syrups, etc.*, 184 Misc. 941, 944 (1945), aff'd in 269 A. D. 931 (Case No. 8, First Dept.). They were not meant to regulate or in any way affect general rights to damages as between either the employee or the employer *and third parties. Emp. Mutual L. Ins. Co. v. Refined Syrups, etc.*, 184 Misc. 941, 944 (1945), affirmed in 269 A. D. 931 (Case No. 8, First Dept.).

Cf. Article 1, § 16 of Constitution of New York (2 McKinney's Consolidated Laws of New York Ann. 497), which provides that the damages recoverable in actions for wrongful death shall not be subject to any statutory limitations.

Moreover, in their essence Workmen's Compensation Laws substitute a completely *new right and remedy* for an extremely doubtful pre-existing common law right and remedy theoretically available to employees in hazardous employments. (For juridical and sociological rationale underlying Workmen's Compensation Laws, see *N. Y. Cent. R. Co. v. White*, 243 U. S. 188, 202-204.) They abolish *entirely* common law principles of negligence and common law defenses peculiarly obtaining as between employee and employer. (*Jensen v. S. Pac. Co.*, 215 N. Y. 514, 519, 526-528, reversed in part and on other grounds in 244 U. S. 205; *N. Y. Cent. R. Co. v. White*, 243 U. S. 188, 202-204.) They establish in lieu of such common law principles the doctrine of absolute liability—*i. e.*, liability wholly regardless of the existence of fault or negligence and contributory negligence, with a concrete compulsory plan of insurance coverage for the benefit of employees.

[N. B. For historical background of doctrine of absolute liability, see Restatement of the Law of Torts, Ch. 40, Introd. Note, p. 221; Pollack on Torts (14th Ed.) p. 11; see also the *Jensen* case and the *N. Y. Cent. R. Co.* case above. As part of the amendment of the N. Y. Constitution (Art. 1, § 18, 2 McKinney's Cons. Laws of N .Y. Ann. 500), the doctrine of absolute liability and the insurance formula are expressly made the basis of the Workmen's Compensation Law of New York.]

Unlike the Workmen's Compensation Acts, the Warsaw Convention *does not substitute* a completely new substantive right and remedy for any existing common law right and remedy. This was even recognized by Mr. Justice Schreiber in the *Wyman* case, where he said (181 Misc. 963, 966):

> " * * * No new substantive rights were created by the Warsaw Convention * * *."

Unlike the Workmen's Compensation Acts, the liability provisions (Arts. 17, 20-22, and 25, 49 Stats. at Large, 3000, 3018-3020) of the Warsaw Convention *are predicated upon the doctrine of negligence or fault*, and not upon the principle of absolute liability. And, unlike the Workmen's Compensation Acts, the Warsaw Convention *does not embody any compulsory insurance coverage for the benefit of passengers and their families!*

Knauth, in contrasting the "Uniform State Aeronautical Liability Act adopted at Cleveland", with the Warsaw Convention, in 9 Air Law Rev. 352, 354, emphasizes that the Warsaw Convention rests essentially upon the doctrine of *fault—i. e. negligence*, as opposed to that of absolute liability, *without provision for compulsory insurance protection to injured parties.*

To same effect: Cha's article "The Air Carrier's Liability to Passengers in International Law" (1936), 7 Air Law Rev. 25, 34-35, where, in passing, it is significantly pointed out that Article 20, par. 1, of the Warsaw Convention, "may do away with the objective liability contemplated in Article 17. The defendant carrier can always plead that he or his agents took necessary measures to prevent injury to the passenger. The term 'necessary measures' is rather vague. The measures necessary for the carrier to take may vary with circumstances. The carrier can likewise plead that it was impossible to prevent the injury."

And in this connection it should be noted that under Article 21 of the Warsaw Convention *contributory negligence* of the person injured *may entirely exonerate the carrier from liability.*

In view of the foregoing legal considerations, the conclusion is ineluctable that Workmen's Compensation Laws of various states and cases pertaining thereto, are wholly inapplicable as juridical analogues in the determination of the instant question of unconstitutionality under the Seventh Amendment.

POINT IV

The Federal Employer's Liability Act and cases thereunder uphold the common law principle of unlimited liability for torts and are, therefore, consonant with the Seventh Amendment.

An endeavor is made by Respondant to find some refuge in the Federal Employer's Liability Act (pp. 22-25 of Respondent's brief) and the Second Employer's Liability Cases thereunder.

However, as stated in *Sibert v. Litchfield, etc.*, 159 S. W. (2d) 612, 619 (1941), unreported officially:

> "Confessedly there is no yardstick by which to accurately measure the size of a verdict which this Court will approve in death cases arising under the Federal Employer's Liability Act."

Accord:

Louisville & N. R. Co. v. Stephens, 298 Ky. 328, 343, 182 S. W. (2d) 447 (1944);

Chesapeake & Ohio Ry. v. Kelly, etc., 241 U. S. 485, 489, 491 (1916);

Haidacker v. Central R. R. Co. of N. J., 52 Fed. Supp. 713, 714-715 (E. D. N. Y. 1943);

Cunningham v. Pennsylvania R. R. Co., 55 Fed. Supp. 1012-1013 (E. D. N. Y. 1944);

Tumulo v. Reading Co., 52 Fed. Supp. 956, 957 (D. N. J. 1943).

In *Second Employer's Liability* Cases, 223 U. S. 1 (cited at p. 24 of Respondent's brief), the principal question concerned the power of Congress to regulate the relations between carriers

and their employees in interstate commerce (p. 46). The objection to the unconstitutionality of the Employer's Liability Act was made *not under the Seventh Amendment*, but rather under the Fifth Amendment. No point was there presented or considered as to the substantive right to trial by jury on issues of damages. The excerpt as quoted from that case by defendant has particular reference only to *common law rules* of liability and defenses peculiar to negligence actions as between employees and employers, such as the fellow servant rule, the assumption of risk rule, etcetera. In this connection, it is significant that the Court stressed the consideration that (p. 50):

> "'* * * the law itself as a rule of conduct may be changed at the will * * * of the Legislature, *unless prevented by constitutional limitations.*'" (Emphasis ours.)

In the case at bar one of the points presented is precisely that the legislative act of the United States Senate and the executive act of the President, as reflected in the limited liability provisions of the Warsaw Convention, are "*prevented by constitutional limitations*".

POINT V

The Warsaw Convention does not substitute admiralty doctrines of liability exemption and limitation for the general principle of unlimited *tortious* liability of common carriers.

By way of *gratis dictum*, the Appellate Division in the *Garcia* case (269 A. D. 287, 293) said:

> "* * * these provisions in effect substitute the admiralty doctrine of exemption from liability conditioned on lack of fault as statutory limitation of liability for the theory of liability of common carrier."

[N. B. Presumably, the admiralty liability exemption and limitation doctrines referred to are those in the Federal Fire Statute (R. S. § 4282, Act of March 3, 1851, c. 43, 46 U. S. C. A. 104, § 182) and its companion Federal Liability Limitation Statutes (R. S. § 4283 and 23 Stat. 57, 46 U. S. C. A. 109, 160, § 183, § 189).]

This statement is erroneous. It is without support in the basic aviational regulatory purposes of the Warsaw Convention or in any judicial precedent. Its source is merely the bald conclusion of a writer in 22 Corn. L. Q. 561, cited at page 293 in the *Garcia* case, without any demonstration of its validity. It is directly contradicted by Cha in 7 Air Law Rev. 25, 34-35 (see p. 7, *supra*) and by Knauth in 9 Air Law Rev. 352, 354 (see p. 7, *supra*).

In our American jurisprudence it is definitely recognized that the liability exemption and limitation doctrines and analogies peculiar to admiralty have no application to torts of the air. From early common law times up to our modern era, the land and the air have been regarded, in legal contemplation, as inseparable. (50 C. J. 751-752. The source of this juridical concept is the maxim—"*Cujus est solum ejus est usque ad coelum*—He who possesses land possesses also that which is above it." (17 C. J. 391; 2 Black. Comm. 18; 3 Kent's Comm. (14th Ed.) 401).) Accordingly, the legal principles and rules reigning over the domain of "land" are considered as supreme over its incidental natural atmospheric element—the air. This is in conformity with the maxim—"*Cujus juris* (*i. e., jurisdictionis*) *est principale ejusdem juris erit accessorium*—an accessory matter is subject to the same jurisdiction as its principal" (17 C. J. 391).

Thus, Section 6 of the Uniform Aeronautics Act, as approved by the National Conference of Commissioners on Uniform State Laws in 1922, 11 Uniform Laws Ann. 163, expressly provides that the liability of the owner of aircraft to passen-

gers for damages occasioned "in the air shall be determined by the rules of law applicable to torts on land".

Thus, Section 177 (a), the Federal Air Commerce Act (44 Stat. 572, 49 U. S. C. A., 1949 Cum. Supp. 123, § 177, subd. (a)) of 1926 expressly states that "*the navigation and shipping laws of the United States * * * shall not be construed to apply to seaplanes or other aircraft * * *.*" (Emphasis supplied.)

Thus, as stated in 6 Am . Jur. 33, § 56:

> "The principles which govern carriers by other means, such as by railroad or motor bus, govern carriers by aircraft."

See also:

§ 787 (a) of the Federal Civil Aeronautics Act of 1938 (52 Stat. 977, 49 U. S. C. A., 1949 Cum. Supp. 331, § 787, subd. (a));

Re: Reinhardt v. Newport S. F. Corp., 232 N. Y. 115, 118, (opinion by Cardozo, J.);

Dollins v. Pan-American Grace Airways, Inc., 27 Fed. Supp. 487, 488-489 (S. D. N. Y. 1939);

Noakes v. Imperial Airways Ltd. et al., 29 Fed. Supp. 412-414 (S. D. N. Y., 1939);

Bogert in his article "Problems In Aviation Law", 6 Corn. Law Q. 271, 302.

The foregoing considerations are also dispositive of Judge Rifkind's inaccurate analogizing reference to the Maritime Federal Fire and Liability Limitation Statute in the *Indemnity Insurance* case (58 Fed. Supp. 338, 340).

Moreover, the assumption that the Warsaw Convention embodies the admiralty doctrines of liability exemption and limitation is untenable on other serious grounds. The implication

of such assumption is that the Senate and the President could and did extend, through their act of adherence to such Warsaw Convention, the Federal Admiralty powers so as to convert *aviation* cases under such Warsaw Convention into "admiralty cases", or "claims in the nature of admiralty". Restrictions, however, in Article 3, § 2, cl. 3, and the Seventh Amendment, preclude the exercise of such power by any branch of our Federal government.

In *U. S. v. One Hundred and Thirty Barrels of Whisky*, 27 Fed. Cases (Case No. 15938), 281-282 (S. D. Ohio), the Federal Court expressly held that *Congress has no power to deprive any litigant of his rights under the Seventh Amendment* "by declaring that a case *not* properly within the jurisdiction of the admiralty, shall be treated and dealt with according to the known principles of courts of admiralty".

To same effect:

Bogert in 6 Corn Law Q. 271, 305;

The Sarah, 8 Wheat. (21 U. S.) 391, 394-395, (Marshall, Ch. J.) as reaffirmed in *U. S. v. 422 Casks, etc.*, 1 Pet. (26 U. S.) 547, 548;

1 C. J. 1252, § 19;

Cf. 31 Am. Jur. 556-557 (§ 7);

16 R. C. L. 197, § 15.

POINT VI

The decisions of the Special Term and the Appellate Division of the New York State Supreme Court necessarily involve a determination of one or more of the Federal questions at bar.

Respondent's statement under Point III of its brief, that the decisions of such State Courts may have been on a state ground

or on a federal ground, is erroneous. The so-called fourth defense (R62-68) *does not plead a general contract* between Respondent and decedent which is wholly independent of, or unrelated to, the Warsaw Convention. On the contrary, it expressly incorporates the liability limitation provisions of the Warsaw Convention. Thus, it states, inter alia, (R68):

> " • • • in accordance with the aforesaid agreement the rights of the parties herein were and are governed by and subject to the rules relating to the liability established by the said Warsaw Convention • • • and defendant claims a limitation of liability in accordance with the rules relating to liability for debt established by said Convention • • •."

Since the particular segment of the Warsaw Convention which purports to limit Respondent's *tortious liability for damages*, is inextricably interwoven with such contract (R. 62-68), the unconstitutionality of such segment of the Warsaw Convention under the Seventh Amendment permeates such contract itself, invalidating the liability limitation therein *as directly stemming from the Warsaw Convention*. This point of petitioners is grounded in authoritative pronouncements by this Court and other authorities (see pp. 37-38 of Petitioners' main brief). It presents a federal question exclusively.

Also fallacious is Respondent's argument that "a second state ground independent of any federal question" exists in the question of whether decedent, in such transportation contract, waived his rights under the Seventh Amendment. This question, concerning as it does one of the fundamental guarantees in the Federal Constitution in relation to the legal effect of subdivision (1) of Article 22 of the Warsaw Convention as inextricably interwoven with such transportation contract, is a federal not a state question. It unavoidably involves a determination of the federal question of the legal effect of the constitutionality under the Seventh Amendment of subdivision

(1) of Article 22 of the Warsaw Convention *on the identical liability limitation provisos of such Warsaw Convention as expressly incorporated in such transportation contract.* (See Point II of Petitioners' main brief, pp. 37-38.)

However, assuming arguendo, without conceding, that such question concerns a state ground exclusively, it will not operate, in the situation at bar, to preclude this Court from taking jurisdiction to review the other federal questions. As demonstrated under Point III of Petitioner's main brief (pp. 39-40), Respondent's contention of waiver of the rights under the Seventh Amendment is absolutely incorrect in law. Accordingly, as stated in *Johnson v. Risk*, 137 U. S. 300, 307:

> "Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of two grounds the judgment was based, then *if the independent ground was not a good and valid one*, sufficient of itself to sustain the judgment, *this Court will take jurisdiction of the case*, because when put to inference as to what points the State Court decided *we ought not to assume that it proceeded on grounds clearly untenable.*" (Emphasis supplied.)

Accord:

Klinger v. Missouri, 13 Wall (80 U. S.) 257, 263;

Maguire v. Tyler, 8 Wall (75 U. S.) 650, 665.

Furthermore, no matter which or how many of the closely allied first seven federal questions concerning the application of the Seventh Amendment in the case at bar may have been decided, the orders and the judgments herein could not have been made unless the eighth question* was also determined by the Special Term and the Appellate Division. That question challenges the validity of subdivision (1) of Article 22 of the

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*See pp. 7-8 of Petitioners' main brief.

Warsaw Convention per se and as expressly incorporated in the transportation contract (R. 62-68), as a matter of correct legal construction. (See Point IV of Petitioners' main brief, pp. 40-55.) That question is exclusively a federal one, and is *entirely independent* of any of the first seven questions.

CONCLUSION

A

Analysis of Basis of Recommendations, by the Departments of Commerce and State, of United States Adherence to the Warsaw Convention, with Specific Reference to the Question of the Restriction of the *Tortious* Liability of Air Carriers.

The recommendations of United States adherence to the Warsaw Convention as contained in the letter (R. 75-76) dated November 28, 1933, from the Department of Commerce to the Department of State, and in the report (R. 76-81) of the Department of State based thereon, do not appear to be predicated upon any consideration or study whatever of the serious specific questions herein presented concerning the invalidity of Subdivision (1) of Article 22 of the Warsaw Convention.

On the contrary, so far as concerns the provisos purportedly limiting the air carriers' liability for *tortious* conduct, they are founded on loose superficial generalities and concepts clearly in contravention of the Seventh Amendment of the United State Constitution and fundamental principles of law and justice governing the correct construction of the Warsaw Convention. Indeed, their very language reveals that they were influenced primarily and predominantly by considerations favoring the economic advantages and interests of the American air transport operators. Thus, the Department of Commerce, in its letter to the Department of State, wrote (R. 75):

> " • • • All United States operators conducting international air transport services strongly favor adher-

> ence to the Convention by the United States * * *. The Aeronautical Chamber of Commerce of America, the trade association organization representing 90% of those operating internationally, strongly favors participation in the Convention. No airline operated at the present time has indicated opposition to adherence to the Convention by the United States."

Thus, the Department of State, in its report, expressed the following (R. 80):

> "This Convention has been studied by the Department of Commerce ,which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and *afford protection to the air transport operator* as well as to passengers and shippers, and that *if the United States fails to become a party to the Convention American air transport lines operating on an international basis will be at a disadvantage* while operating in countries that are parties to the Convention." (Emphasis supplied.)

The blanket statement of both the Department of Commerce and the Department of State that "the provisions of the Convention are fair and afford protection * * * to passengers" is sheer illusory flimsiness. It is contradicted by realities in all situations *where*, as in the case at bar, *it can be established by proof that a passenger's injuries and death were caused by the negligence of the carrier* and the resulting damages are considerably in excess of the sum of $8,291.87 as fixed in the Convention. In such cases, passengers and their dependent families gain nothing—indeed, inequitably lose the greater measure of the value of their property rights in damages under the Convention's arbitrary limitations of the carrier's liability.

[N. B. Cf. the established principle of *unlimited* liability *for negligence* of common carriers of the sea in the sphere of maritime or admiralty law. It is highly significant that the Federal Liability Limitation Statutes in admiralty law in no

way affect the right to recover unrestricted damages for injuries or death resulting from *negligence* of vessel owners or operators. *Liverpool, etc. v. Phenix*, 129 U. S. 397, 438, 440; *The Wildomino*, 300 Fed. 5, 8, 10-11 (C. C. A. 3rd, 1924), cert. dismissed in 270 U. S. 641 (Case No. 167); *N. Y. C. Railroad Co. v. Lockwood*, 17 Wall. (84 U. S.) 357, 361; *City of Bangor*, 13 Fed. Supp. 648, 649 (D. Mass. 1936); *The Hockley*, 10 Fed. Supp. 908, 914, 917 (1935). In this connection see 46 U. S. C. A. §§ 491, 762, 764 and 46 U. S. C. A. 1947 Cum. Supp., p. 65, § 183c.]

In view of the inequalities in position between passengers and the powerful corporate air carriers and the fact that the Warsaw Convention was predominantly enacted for the benefit of a distinct class of business adventurers acting as common carriers, the general, vaguely broad, and ambiguous terms of such Warsaw Convention and transportation contract thereunder, must be construed most strongly against such business adventurers and most liberally in favor of the general public (Broom's Legal Maxims [10th Ed. 1939], p. 408; *Stowbridge Canal Co. v. Wheeley*, 2 B. & Ad. 792; *Priestly v. Foulds*, 2 Scott N. R. 205, 228; *Gildart v. Gladstone*, 11 East 675, 685; *Ribble Navig. Co. v. Hargreaves*, 17 C. B. 385, 402.)

B

The Warsaw Convention *does not confer real benefits* on passengers and their families as contrasted with those provided by existing laws.

Contrary to the general assertions in the report of the Department of State (as quoted at pp. 6-7 of Respondent's brief) *no real benefits* are conferred by the Warsaw Convention on passengers or their families as contrasted with those provided by existing laws.

To begin with, under prevailing general law, the general public are entitled to expect nothing less than the "highest degree of carefulness" and diligence (*N. Y. C. R. R. v. Lockwood*, 17 Wall [84 U. S.] 357, 378) from common carriers *for the safety of passengers and the protection of their families.* The rules of the Warsaw Convention will be searched in vain for anything providing a greater measure of security for lives and families than this. Indeed, the arbitrary limitations of the common carrier's tortious liability as prescribed in such Warsaw Convention, *tend to lessen* rather than promote the high degree of care to be exercised by such common carriers and their agents. (See authorities at pp. 53-55 of Petitioners' main brief.)

The presumption of negligence afforded in Article 17 of the Warsaw Convention, probably more frequently than otherwise, would be nothing more than an illusory balloon. For it generally lies in the power of a common carrier to explode it instantly with but a slight pinprick under Article 20 of such Warsaw Convention. That Article rather vaguely provides:

> "(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Besides, under the existing general law in various jurisdictions, including New York, there is already available an identical presumption of negligence in the common law doctrine of *res ipsa loquitur*, which is applicable in aviation negligence cases.

[N. B. In Charlesworth's "The Law of Negligence" (1938 Ed.) it is stated (p. 122): "When negligence is in question the doctrine of *res ipsa loquitur* applies as well to aircraft as to other vehicles." Accord: 6 Am. Jur. 40, § 73; 83 A. L. R. 370-371; *Stall, etc. v. Curtiss Flying Service Inc.*, 1930 U. S. Av. R. 148, 152-153 (N. Y. Sup. Ct. N. Y. Co., unreported

officially) aff'd in 236 A. D. 664 (Case No. 5, 1932); *Braman-Johnson, etc. v. Thompson*, 167 Misc. 167, 171 (1938).]

And irrespective of where the tort of negligence may occur, such presumption being procedural, may be invoked under the *lex fori*. (*Spokane Inland R. R. v. Whitley*, 237 U. S. 487, 495; *Sapone, etc. v. N. Y. C. & H. R. R. R. Co.*, 130 Misc. 755, 756, (N. Y. Sup. Ct., Monroe Co., Rippey, J., 1927); *Kiefer v. Grand Trunk R. Co.*, 12 A. D. 28, 31, aff'd in 153 N. Y. 688; *Murray v. N. Y. O. & W. R. R. Co.*, 242 A. D. 374, 376 (1st Dept., 1934.)

It should not be pre-supposed as suggested in the report of the Department of State (R. 78) that such arbitrary limitation of liability and presumption of negligence will serve to lessen litigation. For, according to experience of realism, so long as it generally lies in the ability of a common carrier to offer some defensive evidence to rebut the presumption of negligence, it may be expected to do so. After all, the basis of the liability of the common carrier, even under the Warsaw Convention, is the principle of *negligence or fault*, as distinguished from the theory of absolute liability (9 Air Law Rev. 352, 354; 7 Air Law Rev. 25, 34-35).

Moreover, the Warsaw Convention nowhere provides for any real benefits for passengers and their families in terms of *compulsory insurance* to be furnished by common air carriers (9 Air Law Rev. 352, 354).

C

The established principle of unlimited liability for *negligence* of common carriers of the sea vis-a-vis the doctrine of unlimited liability for negligence of common carriers of the air advocated by petitioners.

Nor is the purpose of such Warsaw Convention in fostering international air transportation and commerce a justification

for the sacrifice of considerations of public policy and morality, and substantial rights of passengers and their families to recover full compensation for harmful negligence of common air carriers. In admiralty, the design of the Harter Act (27 Stat. 445, 46 U. S. C. A. 188, § 19 *et seq.*) the Federal Fire Statute (46 U. S. C. A. 104, § 182) and the Federal Liability Limitation Statutes (46 U. S. C. A. 109, 160, § 183 as amended, § 189) is "the encouragement of shipbuilding and the employment of ships in commerce" (*The Santa Rosa*, 249 Fed. 160, 161 [N. D. Calif., 1918]). Yet, the principle has long been firmly established, even in admiralty, that in all cases of property damages or personal injuries or death *caused by the negligence or fault* of the vessel owners or operators, the right to recover full compensation is *not* affected by the Federal Liability Limitation Statutes (*Liverpool Steam Co. v. Phenix*, 129 U. S. 397, 438, 440; *The Wildomino*, 300 Fed. 5, 8, 10-11 (C. C. A. 3rd, 1924), cert. dismissed in 270 U. S. 641, (Case No. 167, 1926); *Railroad Co. v. Lockwood*, 17 Wall (84 U. S.) 357, 361; *City of Bangor*, 13 Fed. Supp. 648, 649 (D. Mass., 1936); *The Irving F. Ross*, 8 Fed. [2d] 313-314 (D. Mass., 1923); *The Hockley*, 10 Fed. Supp. 908, 914, 917 (1935); *Hines v. Butler*, 278 Fed. 877, 879-881 (C. C. A. 4th, 1921), cert. den. in 257 U. S. 659, (Case No. 662); *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 553. In this connection, see 46 U. S. C. A., §§ 491, 762, 764, and 46 U. S. C. A., 1948, Cum. Supp. 67, § 183c, L. 1936). In such cases contractual limitation of liability has been enforced only on the basis of a reduced transportation rate *voluntarily chosen* by the shipper or passenger (*Liverpool Steam Co. v. Phenix, etc.*, 129 U. S. 397, 437-439, 441-442; *The Wildomino*, 300 Fed. 5, 8, 10-11, (C. C. A. 3rd, 1924), cert. dismissed in 270 U. S. 641 Case No. 167, 1926). Palpably, the principle of full liability for the *negligence* of pliers of the sea is recognized to be maintainable in consonance with the furtherance of *safe* international maritime transportation and commerce. By the same

token, essentially the same principle of full liability for the *negligence* of common air carriers would be in accord with the promotion of *secure* international air transportation and commerce. Both the common carrier of the sea and the common carrier of the air, are alike subject to high moral and legal duties to exercise maximum precautions for the protection of passengers and their families. If the responsibility of one is unlimited in cases of his negligence, so should the other be in identical situations.

D

Full liability for checked baggage and goods, as expressly recognized in the Warsaw Convention vis-a-vis full liability for value of God-given precious human life under Seventh Amendment.

As to all checked baggage and goods, the Warsaw Convention itself implements the common law principle of unlimited liability for those who are given an opportunity to demand it and pay "a supplementary sum" therefor.

[N. B. Article 22, Subdivision (2), 49 U. S. Stats. at Large, 3000, 3019. In essence its terms follow such established common law principle as codified in the Federal Interstate Commerce Act of February, 1887, as amended by the Hepburn-Carmack Act of June, 1906, as further amended by the Cummins Acts of 1916 and 1920, 49 U. S. C. A. § 20.11; *Adams Express Co. v. Croninger*, 226 U. S. 491, 509-510; *Hartzberg v. N. Y. C. R. R. Co.*, 181 Misc. 129, 136 (1943) aff'd in 268 A. D. 904-905 (1944, Case No. 10, aff'd in 295 N. Y. 703).]

Certainly, there can be no valid reason why mere goods should be thus accorded full protection within the framework of the Seventh Amendment, and the value of God-given precious human life should be denied the same common law and constitutional privilege. Certainly, the Seventh Amendment

makes no arbitrary discrimination in favor of material possessions as against precious human life. Its aegis covers both.

E

Salient Points

In the light of the applicable legal considerations and authorities, Subdivision (1) of Article 22 of the Warsaw Convention is void and unenforceable because it infringes such Seventh Amendment. Such unconstitutionality fatally infects and renders unenforceable the liability limitation provisos of the transportation contract at bar (see discussion of these points and supporting authorities at pp. 37-38 of petitioners' main brief).

Moreover, as previously demonstrated, the liability limitation provisions of such Warsaw Convention and the transportation contract thereunder are void and unenforceable upon another serious ground. They are fatally general, vaguely broad, and infected with ambiguity and uncertainty as to the causes and the kinds of liability of Respondent, and as to the persons affected thereby (see discussion of this point and supporting authorities at pp. 40-55 of petitioners' main brief).

Accordingly, a writ of certiorari should be granted as prayed for in the petition.

Respectfully submitted,

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